Supreme Court, U.S.
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No. 01-1870

In The
SUPREME COURT OF THE UNITED STATES

ADRIENNE COBB, EDDIE OLIVER, TOMMY PERKINS, and NATHALAN PERKINS, *Petitioners*,

v.

ROBERT ROSHTO, RAYMOND E. HOLLOWAY, TERRY E. PITRE, MURPHY J. PAINER, SAM GARAFOLA, UNKNOWN AIMEE, Agent, JEFF WESLEY, SCOTT JONES, and THE CITY OF DENHAM SPRINGS, LOUISIANA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondents in Opposition to Petition for Writ of Certiorari

Bradley C. Myers (#1499)
Lana D. Crump (#23707)
KEAN, MILLER, HAWTHORNE, D'ARMOND, MCCOWAN & JARMAN, L.L.P.
P.O. Box 3513
Baton Rouge, LA 70821
(225) 387-0999

Counsel of record for Respondents Jeff Wesley, Scott Jones, and The City of Denham Springs

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred when it found that the District Court properly exercised its discretion in declining to maintain supplemental jurisdiction over any state law claims, where the state law claims predominate over the remaining federal claims and the same state claims are pending in state court.

2. Whether the Fifth Circuit erred when it found that the District Court properly decided the motion for partial summary judgment filed by the City of Denham Springs, Jeff Wesley and Scott Jones, by dismissing the following claims on the ground that no genuine issue of material fact exists and defendants are entitled to judgment as a matter of law:
   - Dismissing all federal claims by Tommy Perkins against defendants, where Perkins was never prosecuted or otherwise forced to defend the liquor law violations charged by the Denham Springs ABC Board; where Perkins failed to come forth with evidence of a constitutional deprivation arising out of the charges; and where Chief Jeff Wesley's action in seizing almost 200 bottles of liquor from Perkins' unlicensed premises was objectively reasonable;
   - Dismissing the federal claims of Nathalan Perkins against defendants raised in defendants' motion for partial summary judgment, where Perkins failed to prove a violation of her Fifth or Sixth Amendment rights following her arrest on drug offenses.

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Adrienne Cobbs, Tommy Perkins, Nathalan Perkins, and Kathy Scott, Latasha Scott, and Jame Oliver, Jr. (substituted as parties plaintiff for Eddie Oliver); *Plaintiffs-Petitioners;*

Robert Roshto, Jeff Wesley, Scott Jones, and The City of Denham Springs, Louisiana; *Defendants-Respondents.*

CORPORATE DISCLOSURE STATEMENT

No party hereto is a nongovernmental corporation.

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The opinion of the Fifth Circuit Court of Appeal was not designated for publication. The Order of the United States District Court for the Middle District of Louisiana deciding the motions for summary judgment is not reported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the constitutional provisions and statutes cited below appear in the appendix. Supreme Court Rule 24.1(f).

Petitioners' claims for violation of their constitutional rights and for conspiracy to violate their constitutional rights are brought pursuant to 42 U.S.C. §1983 and §1985.

The claims of Tommy Perkins which were dismissed on the respondents' motion for partial summary judgment were for alleged violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Louisiana Civil Code article 2315. Nathalan Perkins' claims which were dismissed on respondents' motion for partial summary judgment were for alleged violations of the Fifth and Sixth Amendments to the United States Constitution, and La. Civ. Code art. 2315.

Further, although the petitioners invoked the District Court's jurisdiction over the state law claims pursuant to 28 U.S.C. §1367, the court declined to exercise jurisdiction over those claims.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, respondents state that they perceiye several misstatements of fact in the petition for writ of certiorari. For the sake of brevity and clarity, respondents discharge their obligation to the Court to point out the misstatements by presenting their own statement of facts in the stead of petitioners' presentation of the facts. Supreme Court Rule 24.2.

A. Nature of the Case.

Plaintiffs-petitioners characterize this case as a suit arising out of efforts by plaintiffs to renew a liquor license for the business located at 436A Summer Street in Denham Springs, Louisiana ("the premises"), and the "unnecessary court battles which ensued" to obtain and maintain a liquor license for the premises. Specifically, plaintiffs claim that efforts were made to deprive them of a liquor license for the business, and that the illegal searches and false drug charges were made against Adrienne Cobbs and Nathalan Perkins in furtherance of that purpose. Defendants deny these allegations.

B. Course and Disposition of Proceedings Below.

Plaintiffs filed this suit on July 9, 1998, alleging violations of various constitutional rights, and state law tort claims.[1] Jurisdiction

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[1] These claims were first made on March 14, 1997, pursuant to a "Second Amended Petition for Damages from a Decision of the Commissioner of the Office of Alcohol Beverage Control Denying Permit for Retail Class AR Beer and Liquor Permit", to the suit

was based on 42 U.S.C. §1343, for alleged violations of civil rights, and under 28 U.S.C. §1367. Plaintiffs named as defendants various officials and employees of the Louisiana Office of Alcohol Beverage Control ("the state defendants"),[2] and Jeff Wesley, Scott Jones and the City of Denham Springs ("the Denham Springs defendants" or "defendants"). All state defendants were dismissed from the case except for Robert Roshto.

On March 24, 2000, the Denham Springs defendants filed a motion for partial summary judgment seeking a dismissal of all claims filed by Tommy Perkins, Eddie Oliver, Adrienne Cobbs and Nathalan Perkins, except for Adrienne Cobbs' and Nathalan Perkins' §1983 claims for alleged violations of their Fourth Amendments rights. Specifically, defendants moved for partial summary judgment on all other remaining claims on the following grounds: (1) Tommy Perkins cannot prove his federal §1983 claims for violations of his rights, or his state law claims; (2) Adrienne Cobbs cannot prove her federal §1983 claims for violation of her constitutional rights, or her state law claims; (3) Nathalan Perkins cannot prove her federal §1983 claims for violation of her

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entitled *Adrienne Cobbs d/b/a AC's Restaurant and Lounge, et al v. Commissioner, Department of Public Safety & Corrections, et al*, No. 77,310, 21st Judicial District Court, Parish of Livingston, State of Louisiana. On July 23, 1997, the state court granted an exception of improper cumulation filed by the Denham Springs defendants. Complaint, para. 2.

[2]These individuals were Raymond E. Holloway, Terry E. Pitre Murphy J. Painter, Sam Garafola, Robert Roshto and "Agent Aimee".

constitutional rights; and (4) Plaintiffs cannot prove a conspiracy in violation of 42 U.S.C. §1985.

At oral argument on June 21, 2000, the Court heard defendants' motion for partial summary judgment, and Robert Roshto's motion for summary judgment. During the hearing, the Court declined to maintain supplemental jurisdiction over any state law claims and remanded those claims. Judgment was entered accordingly on June 22, 2000.

On July 5, 2000, after additional briefing by plaintiffs on the issue of Section 1983 liability of the City of Denham Springs, the Court granted the motion for summary judgment filed by Robert Roshto, and granted in part and denied in part defendants' motion for partial summary judgment, essentially granting the motion on all claims presented for summary judgment except Adrienne Cobbs' claims. Judge Peter Beer's written order made it clear that Section 1983 is serious business, and it is not appropriate to see it as a "federal grab bag whereby one makes his way onto the field of battle with the hope of visiting a sort of trip and fall victory over his opponent."

The Fifth Circuit Court of Appeal upheld the District Court's ruling as to the Denham Springs defendants, namely (1) affirming the grant of summary judgment on the §1985 conspiracy claims raised by Tommy Perkins and Nathalan Perkins; (2) affirming the grant of summary judgment on Tommy Perkins' §1983 claims against the Denham Springs defendants; (3) affirming the grant of summary judgment on Nathalan Perkins' §1983 claims for the incidents other than the Fourth Amendment claims arising out of her arrest and the search of her home; (4) affirming the District

Court's discretionary decision to remand the petitioners' state law claims to the state court; and (5) affirming the dismissal of Eddie Oliver's claims against the Denham Springs defendants.

C. Statement of Facts.

Below is a chronology of key events that bear on the issues that would be before the Court as to the Denham Springs defendants if certiorari were to be granted:

1996

April 1, 1996	Bay Lane, Inc. leases 436A Summer Street to Adrienne Cobbs.
April 29, 1996	Louisiana Office of Alcohol Beverage Control ("State ABC") Officer Mike Aimee finds alcohol while conducting an inspection of 436A Summer Street in connection with Adrienne Cobbs' liquor license applications. The Denham Springs Police Department seizes 191 bottles of alcohol from Tommy Perkins' office at 436 Summer Street and charges Tommy Perkins with three violations of the Louisiana Alcohol Beverage Control Law, La.R.S. 26:1, *et seq.*

April 29, 1996	Denham Springs Alcohol Beverage Control Board ("Denham Springs ABC") issues notice to Tommy Perkins to appear at a special meeting.
May 1, 1996	Denham Springs ABC Board grants extension and continuance to Tommy Perkins.
May 7, 1996	Denham Springs ABC grants Tommy Perkins another continuance.
May 20, 1996	Ms. Cobbs completes the applications for liquor licenses for 436A Summer Street by having submitted completed paperwork to both Denham Springs ABC and State ABC.
May 21, 1996	Denham Springs Police Department searches Adrienne Cobbs' home pursuant to search warrant, seizes illegal drugs, and charges Adrienne Cobbs with resisting arrest and three violations of the Uniform Controlled Dangerous Substances Law, La. R.S. 40:961, *et. seq.*
May 28, 1996	Denham Springs ABC Board grants another continuance to Tommy Perkins.

June 21, 1996	State court issues TRO against Denham Springs ABC Board prohibiting it from conducting any proceedings relating to the charges against Tommy Perkins in *Tommy Perkins v. City of Denham Springs Alcohol Beverage Control Board, et al*, No. 76,766, 21st Judicial District Court.
July 11, 1996	Tommy Perkins files a rule to show cause why the TRO should not be converted to a preliminary injunction. Perkins subsequently amends injunction pleadings to plead lack of subject matter jurisdiction of the Denham Springs ABC Board.
August 13, 1996	Denham Springs ABC Board does not act on the Adrienne Cobbs' and Tommy Perkins' matters on the agenda because of the pending injunction and challenge to the validity of the board.
August 1996	State court grants Tommy Perkins' exception and finds the Denham Springs ABC was not authorized by law. The Denham Springs ABC was disbanded and all proceedings instituted by the Denham Springs ABC against Mr. Perkins were discontinued.

August 15, 1996	State ABC denies Cobbs' liquor license application.
August 21, 1996	Adrienne Cobbs files mandamus action against the State ABC and City of Denham Springs seeking action on her liquor license application, entitled *Adrienne Cobbs v. Dept. of Public Safety*, No. 77,310, 21st Judicial District Court.
September 23, 1996	Denham Springs Board of Aldermen approves issuance of Class AR liquor license to Adrienne Cobbs.
December 5, 1996	State ABC issues liquor license to Adrienne Cobbs.

1997

January 7, 1997	City Court grants Tommy Perkins' Motion to Suppress, and orders the return ofthe liquor seized from Tommy Perkins' office at 436 Summer Street in *City of Denham Springs/State of Louisiana v. Tommy Perkins*, No. 149,319 Denham Springs City Court, Ward II.

February 27, 1997	Denham Springs Police Department searches Nathalan Perkins' home pursuant to a search warrant, seizes illegal drugs, and charges Ms. Perkins with two violations of the Uniform Controlled Dangerous Substances Law, La.R.S. 40:961, *et seq.*
March 14, 1997	Plaintiffs file second amended petition in *Adrienne Cobbs vs. Department of Public Safety, et al,* 77,310, 21st Judicial District Court, adding the Denham Springs defendants and new claims.
March 20, 1997	Denham Springs releases seized liquor to Tommy Perkins through attorney Donna Grodner.

The plaintiffs' complaint alleges two categories of claims: (1) plaintiffs' "liquor license" claims against the Denham Springs defendants and the state ABC (through attorney Robert Roshto), and (2) the Fourth Amendment search and seizure claims against the Denham Springs defendants. The District Court denied summary judgment on Cobbs' claims, but granted it as to Tommy Perkins', Nathalan Perkins', and Oliver's claims arising out of plaintiffs' efforts to obtain liquor licenses for the business. The Fifth Circuit affirmed.

Plaintiffs' Fourth Amendment claims arise out of three

separate and distinct events. The first incident was on April 29, 1996, when 191 bottles of liquor were seized from Tommy Perkins' office located in 436 Summer Street, because the premises did not have a license for high alcohol content beverages. Charges were brought against Mr. Perkins for violations of the Alcohol Beverage Control Law. Defendants' motion for summary judgment on all claims asserted by Tommy Perkins arising out of this incident was granted. The Fifth Circuit affirmed.

The other two incidents involve searches of the homes of Adrienne Cobbs and Nathalan Perkins pursuant to search warrants, and their arrests on drug charges in May 1996 and February 1997, respectively. Defendants did not move for summary judgment on the Fourth Amendment claims arising out of these events. However, defendants moved for summary judgment on the purported claims by Cobbs and Nathalan Perkins for violation of the Fifth, Sixth and Fourteenth Amendments arising out of these incidents. Nathalan Perkins' claims were dismissed, and the Fifth Circuit affirmed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioners present no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. Plaintiffs assert erroneous factual findings and/or misapplication of rules of law, circumstances under which a petition for writ of certiorari is rarely granted. Sup. Ct. Rule 10. The nature of these alleged errors, which defendants deny, is shown by the questions presented for review by petitioners (Petition, p. i), which can be interpreted as follows:

I. The Court of Appeal misapplied 28 U.S.C. §1367 when it found that the District Court properly used its discretion to decline supplemental jurisdiction over the state claims;

II. The Court of Appeal made an erroneous factual finding when it found that plaintiffs had insufficient evidence to prove their conspiracy claims under 42 U.S.C. §1985;

III. The Court of Appeal made an erroneous factual finding that there was never a hearing by the Denham Springs ABC involving Tommy Perkins, and all proceedings were dismissed by state court order;

IV. The Court of Appeal misapplied the law of qualified immunity in favor of Jeff Wesley;

Petitioners do not claim a conflict with a decision of another court of appeal; do not present an important federal question that should be decided by this Court; and do not show any departure from the accepted and usual course of judicial proceedings in the lower courts. Sup. Ct. Rule 10(a)-(c). The lower courts' factual findings and application of established law were correct and properly supported by the record. Because petitioners have presented no compelling reason and no reason of the character warranting review of a matter, this Court should deny the petition for writ of certiorari.

ARGUMENT

A. Summary of Argument.

The Fifth Circuit correctly found no abuse of discretion in the remand of the state claims and correctly affirmed the summary judgment dismissing the federal claims brought by Tommy Perkins and Nathalan Perkins,[3] for the reasons discussed below.

1. State Claims

The District Court properly exercised its discretion in refusing to decide the plaintiffs' claims arising under Louisiana law, on the grounds that (1) under 28 U.S.C. 1367(c)(2), the state law claims predominate over the federal claims, and (2) under Section 1367(c)(4), the District Court's decision to decline jurisdiction is justified, since plaintiffs had asserted the identical state claims in a pending state court action.

2. Tommy Perkins

On April 29, 1996, state ABC Officer Mike Aimee called the Denham Springs police department while inspecting 436A Summer Street (the premises for which Cobbs was seeking a license), and requested that 191 bottles of liquor on the premises be seized because the premises was not licensed for high alcohol content beverages. The liquor was in Tommy Perkins' office located in a connecting building behind 436A Summer Street and believed to have the address 436B Summer Street. There was no liquor license for 436A and only a beer permit covering 436B. The Denham Springs police department seized the liquor and Mr.

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[3]The dismissal of Eddie Oliver's claims are not addressed herein, as petitioners have not presented the dismissal of his claims as an issue for review.

Perkins was issued a summons to appear in the Denham Springs City Court for violations of the Alcohol Beverage Control Law. The court found that officer Aimee's search was unlawful, and suppressed the seized liquor. Chief Jeff Wesley thereafter sought clarification of the judge's order to return the seized alcohol to Mr. Perkins because they would have to cite him again for possessing the alcohol on an unlicensed premises. Denham Springs thereafter released the liquor to Mr. Perkins. Mr. Perkins cannot prove any violation of the Fourth, Fifth, Sixth, or Fourteenth Amendments arising out of this incident. Furthermore, Chief Jeff Wesley's actions were objectively reasonable and in good faith, and he is entitled to qualified immunity.

As to the requests by the Denham Springs ABC for Mr. Perkins to appear before the board to discuss the citations under the Alcohol Beverage Control Law, Mr. Perkins was granted several continuances and obtained a court order to dissolve the board before a hearing was ever held. Therefore, the lower courts correctly found that no constitutional deprivation could have occurred.

3. Nathalan Perkins

Nathalan Perkins, who is Tommy Perkins' daughter, never operated or had any ownership interest in any of the businesses at 436A Summer Street. Ms. Perkins was "employed" as a part-time cook in Oliver's Restaurant and Lounge and AC's Restaurant and Lounge. Ms. Perkins seeks lost wages during the period of time the businesses did not have a liquor license. This claim was properly dismissed on the ground that there is no constitutional claim for lost wages under the facts of this case.

In February 1997, the Denham Springs police department executed a search warrant for Ms. Perkins' home. Illegal drugs and drug paraphernalia were found in the search, and Ms. Perkins was arrested on drug offenses. Ms. Perkins asserts claims against the Denham Springs defendants for violations of her Fourth, Fifth and Sixth Amendment rights. The Fifth and Sixth Amendment claims were properly dismissed because Ms. Perkins has no proof that such violations occurred.

4. Conspiracy Claims

Plaintiffs did not prove a conspiracy against Tommy Perkins or Nathalan Perkins in violation of 42 U.S.C. §1985(3), because there is no evidence of a common plan or design among two or more of the defendants to violate the equal protection rights of Tommy Perkins or Nathalan Perkins, and no evidence of any racial or other class-based discriminatory animus by defendants.

B. The Fifth Circuit Properly Found that the District Court did not Abuse its Discretion in Declining to Hear the State law Claims.

1. Scope of Discretion

The District Court in its June 22, 2000 order, declined to maintain supplemental jurisdiction over any state law claims in this matter. 28 U.S.C. §1367(c) provides the court with discretion to refuse to hear the supplemental claims. Bass v. Parkwood Hospital, 180 F.3d 234 (5th Cir. 1999). In making this decision, the Court must consider both the statutory provisions of 28 U.S.C. §1367(c) and the balance of the relevant factors of judicial economy,

convenience, fairness and comity. Id. at 227 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350-51 (1988); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

This Court has made it clear that pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right," and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons. City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 533, 139 L.Ed.2d 525 (1997)(citing Gibbs, 383 U.S., at 726-727, 86 S.Ct., at 1139-1140). Accordingly, "district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." Id., 118 S.Ct. at 533. The supplemental jurisdiction statute [28 U.S.C. §1367] codifies these principles. Id.

28 U.S.C. §1367 confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise:

> "(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> > "(1) the claim raises a novel or complex issue of State law,
> > "(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

> "(3) the district court has dismissed all claims over which it has original jurisdiction, or
> "(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

City of Chicago, 118 S.Ct. at 533-534 (citing 28 U.S.C. § 1367(c)).

2. The District Court's Remand of the State Claims was Proper

The allegations of plaintiffs' complaint contain approximately thirteen (13) separate claims arising under state law, including five claims of malicious prosecution, and multiple claims of abuse of process, intentional infliction of emotional distress, and the tort of "harassment."

At the hearing on the summary judgment motions, the court advised that he was not going to "invade the territory that is property patrolled by the state court system." In declining to exercise jurisdiction over the state claims, the District Court was aware of and concerned about the present state court proceedings involving the same parties. The court specifically asked plaintiffs' counsel whether the plaintiffs were going to proceed with their identical claims in the state court action. The court commented:

> But the notion that this stuff is going to get somehow or other carried over to this federal court simply because nobody wants to go ahead and

> resolve what is extant before the state court, or, even more compellingly, that they think they may not be as fairly treated or whatever, is simply not an acceptable contention as far as this court is concerned.

For these reasons, the District Court declined to exercise supplemental jurisdiction over the state claims and remanded those claims to the proceedings in state court. The Fifth Circuit found no abuse of discretion.

The lower courts' decisions were correct because the circumstances of this case fall within the court's discretion to decline supplemental jurisdiction under 28 U.S.C. Sections 1367(c)(2) and (4), and the Gibbs factors of judicial economy, convenience, and fairness to the parties. Under Section 1367(c)(2), if the claims supported by supplemental jurisdiction "substantially predominate over the claim or claims over which the District Court has original jurisdiction," the court may decline to exercise jurisdiction. The state claims in this case greatly increase the number of ultimate factual issues a jury must consider. The theories of malicious prosecution, abuse of process, intentional infliction of emotional distress, and the tort of "harassment" each contain several elements of proof, and therefore additional fact issues, for consideration by a jury as compared to the remaining federal claims.[4] Trial of the

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[4]The federal claims left to be litigated against the DenhamSprings defendants are the federal claims of Adrienne Cobbs, which include claims under the Fourth, Fifth, Sixth and Fourteenth Amendments, and a conspiracy claim under 42 U.S.C. §1985; and Nathalan Perkins' Fourth Amendment claim.

issues together would also engender confusion for a jury. The court's remand of the state claims were thus proper pursuant to 28 U.S.C. Section 1367(c)(2).

In "exceptional circumstances," a court may decline to exercise jurisdiction when "there are compelling reasons" for doing so. 28 U.S.C. § 1367(c)(4). The plaintiffs' pending state court case presents such a circumstance. Adrienne Cobbs originally filed a mandamus action on August 21, 1996, against the state ABC and Denham Springs seeking action on her liquor license application. That action was entitled "Adrienne Cobbs v. Department of Public Safety," No. 77,310, 21st Judicial District Court. On March 14, 1997, a second supplemental petition was filed, adding all the plaintiffs and defendants in the captioned case, and asserting (in over 100 paragraphs) the same claims which were subsequently brought in the District Court.

In Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert denied, 506 U.S. 1087, 113 S.Ct. 1067, 122 L. Ed. 2d 371 (1993), the court of appeal found "compelling reasons" for declining jurisdiction of state claims when identical claims were pending in state court:

> We find such "exceptional circumstances" and "compelling reasons" here. Adjudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources.

Id., at 125. Given that plaintiffs had elected to seek state court redress, it would not serve the values of economy, convenience,

fairness and comity for the federal court to retain jurisdiction over the plaintiffs' state law claims. Thus, the District Court's decision to dismiss the state law claims was within the court's discretion under 28 U.S.C. §1367(c)(2) and (4), and the Fifth Circuit correctly affirmed that decision.

C. The Fifth Circuit Correctly Found That Summary Judgment was Properly Granted.

1. Tommy Perkins' Federal Claims

a. Fourth Amendment Claim

While a search pursuant to a warrant is preferred, the Supreme Court has recognized flexible, common-sense exceptions to this requirement, such as where voluntary cooperation or consent is given. See, Texas v. Brown, 460 U.S. 730, 735-736, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (and cases cited therein).

On April 29, 1996, state ABC officer Mike Aimee inspected 436A Summer Street as part of the state liquor license permitting process. 436A Summer Street had just become AC's Restaurant and Lounge and was vacant at the time. Tommy Perkins testified that he was in his office in one of the motel rooms of 436B Summer Street.

The buildings housing both businesses were at one time 436 Summer Street. When Mr. Perkins leased the "front" part of the building in the early 1990s for the restaurant and lounge business, the property was divided into 436A and 436B. There is a staircase and a shed connecting the two buildings. Mr. Perkins' office is

located down a hallway behind AC's Restaurant and Lounge.

Agent Aimee inquired about Adrienne Cobbs' license and wanted to go in Mr. Perkins' office. Mr. Perkins unlocked the door to his office and Agent Aimee found 191 bottles of liquor inside. Agent Aimee then called Chief Jeff Wesley. Chief Wesley explained what happened then:

> The phone rang. An individual identifying himself as Mike Aimee with the state ABC asked if I was familiar with Perkins Lounge. I said yes. He said, well, I think you need to come over and look at something. So I drove up. He met me in the parking lot and introduced himself. That's when we went in and went into the office area and saw a very large stash of various alcoholic containers, whiskey, rum, whatever. There were many different containers in that office.

Mr. Perkins only had a beer permit. His lounge at 436B Summer Street was not licensed for high alcohol content beverages. The liquor was seized from Mr. Perkins' office, and he was charged with three violations of the Louisiana Alcohol Beverage Control Law, La.R.S. 26:1, *et seq.*

The Fourth Amendment protects persons against unreasonable searches and seizures. Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Regardless of whether Agent Aimee's inspection of Mr. Perkins' office constitutes an unreasonable "search, the city's seizure of the liquor was objectively reasonable under the circumstances, and Chief Wesley

is entitled to qualified immunity. Qualified immunity protects officials in the course of performance of their discretionary duties unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Chief Wesley is entitled to immunity because his conduct was objectively reasonable under the circumstances. Chief Wesley testified:

> Q. As to the specific violations, where he got those, you don't know, do you?
>
> A. No, but we know, for instance, the fact that he was not licensed to have hard liquor on his premises was certainly a violation of law. We considered it - Though since that time the courts have seen fit to say otherwise, we considered those - that alcohol to be on his premises, and he was in violation because he had the alcohol on his premises.

In fact, when the court suppressed the liquor and ordered it returned, Chief Wesley asked for clarification of the order because "if we returned those beverages to his property, then we'd have to cite him or arrest him for having possession of them." Once the judge clarified his order on returning the liquor, Chief Wesley willingly released the property.

It is clear that Chief Wesley's actions were objectively reasonable under the circumstances, and he is entitled to qualified immunity. The District Court agreed, finding:

> The bar/lounge and the Perkins Motel were situated on the same property owned by Tommy Perkins. Tommy Perkins did not have a license to sell hard liquor. Large amounts of alcohol were found. Although the state court ultimately suppressed the seized alcohol, it cannot be said that the seizure of the alcohol was objectively unreasonable. Qualified immunity protects an official whose conduct was objectively reasonable, even if the conduct infringed upon the plaintiff's constitutional rights. See Anderson. 483 U.S. at 641. Accordingly, the Court finds that Chief Wesley is entitled to qualified immunity in this instance.

b. Fifth and Sixth Amendment Claims

Tommy Perkins complains defendants violated his Fifth Amendment rights against "self-incrimination" and "double jeopardy", and his Sixth Amendment rights to "notice of nature and cause of accusations against him" and "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction."

After the liquor was seized from Mr. Perkins' office, the Denham Springs ABC Board,[5] chaired by Chief Jeff Wesley,

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[5]The function of the Denham Springs ABC board was to review alcohol permit applications, hear citizen complaints, and take administrative action against licensed businesses where appropriate. The Denham Springs ABC Board made recommendations on permit applications on imposing administrative penalties to the Denham

requested Mr. Perkins to appear and respond to the charges at a board meeting on May 1, 1996. Plaintiffs try to paint a picture of improper conduct by the Denham Springs defendants, when in fact the city gave Mr. Perkins every opportunity to speak on his behalf before the ABC board considered administrative penalties against him for the April 1996 alcohol incident. At the request of Mr. Perkins, the board granted an extension and continuance of the administrative hearing. The board thereafter granted Mr. Perkins two more extensions, and issued a formal notice to appear at his request, which included the nature of the offenses, and potential administrative penalties.

When the administrative hearing on Mr. Perkins' violation of the Alcohol Beverage Control Law was finally set for June 24, 1996, Mr. Perkins obtained a TRO against the board to stop the administrative hearing. The June 24, 1996 hearing was canceled. The Denham Springs ABC board issued another notice on July 18, 1996, setting the meeting for August 13, 1996, which was met with a rule to show cause for a preliminary injunction by Mr. Perkins. Then Mr. Perkins challenged Denham Springs' authority to have an alcohol beverage control board.[6] Consequently, the ABC board tabled all ABC matters at the August 13, 1996 meeting, including the Tommy Perkins item and discussion on Adrienne Cobbs' liquor license application. Thereafter, the Court granted Mr. Perkins' rule, and the Denham Springs ABC board dissolved.

Springs Board of Aldermen.

[6]Mr. Perkins asserted that under state law required a city to have a population of at least 400,000 to have an ABC board. According to the city, there is a split in legal authority on that issue.

These events clearly show that there were no violations of Mr. Perkins' rights against self incrimination, double jeopardy, "notice of nature and cause of accusations against him," or "right to be prosecuted for any alleged criminal act in a court of proper jurisdiction." Mr. Perkins was given every opportunity to prepare his case before the Denham Springs ABC Board, which ultimately never occurred.

c. Fourteenth Amendment Claims

Mr. Perkins asserts the following Fourteenth Amendment claims: (1) right to due process of law through needless, vexatious abuse of the civil and administrative process, (2) right to equal protection of the laws through selective prosecution based on race; and (3) right to be free from malicious prosecution. Mr. Perkins articulated the factual basis of his claims under the Fourteenth Amendment as follows:

> Response to Interrogatory No. 21: Due process of law requires adequate notice and an opportunity to present a defense. Also, because Mr. Perkins is an African American his family was targeted for drug busts by Chief Wesley and Scott Jones as a way to get back or get to Mr. Perkins or run him out of business.

Mr. Perkins' 14th Amendment due process claim for alleged abuse of the "administrative process" falls because the Denham Springs ABC Board did not "prosecute" Mr. Perkins. Mr. Perkins won his challenge of the ABC Board's authority to act, and the administrative proceedings that the Denham Springs ABC

Board planned to conduct regarding the alcohol charges never occurred. It is undisputed that a hearing was never held and no administrative penalties were assessed against Mr. Perkins arising out of the alleged alcohol violations.

Mr. Perkins' "selective prosecution" and "malicious prosecution" claims likewise fail. In order to find an equal protection violation on the grounds of "selective enforcement", it must be shown that the selection was deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Similarly, a claim of malicious prosecution is cognizable under §1983 only if the prosecution is conducted with the intent to deprive a person of equal protection of the law. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988).

In the present case, there is no evidence that Mr. Perkins was singled out for prosecution, while others similarly situated who had committed the same acts were not prosecuted. See, United States v. Tibbatts, 646 F.2d 193, 195 (5th Cir. 1981). Moreover, there is no showing of arbitrary, capricious or malicious "prosecution" of the alcohol violations in Denham Springs City Court, or any evidence that the "prosecution" of Mr. Perkins was based on an unjustifiable standard such as race, religion or gender. See, U.S. v. Lichenstein, 610 F.2d 1272, 1281 (5th Cir.) cert denied, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980). Mr. Perkins' only "proof" is a bare allegation and suspicion of racial discrimination. Mr. Perkins admits that the city has never revoked his license for Perkins' Motel and Lounge (436B Summer Street), and has never made an effort to shut down that business.

That the city court found Agent Aimee had authority to inspect only 436A (not 436B) and that the police department was wrong in seizing the alcohol, does not turn defendants' actions into ones motivated by race discrimination. Mr. Perkins must prove that racial animus motivated Agent Aimee and the Denham Springs defendants to seize the alcohol and charge him with the alcohol violations.

Consequently, there exists no proof of an intent to deprive Mr. Perkins of equal protection of the laws, and no proof of an actual violation. The defendants must have "selected . . . a course of action at least in part 'because of' not merely 'in spite of' its adverse effects on an identifiable group". Personnel Administrator v. Feeney, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Mr. Perkins has fallen short of his difficult burden of proving discriminatory intent or disparate treatment by the Denham Springs defendants as required to establish the constitutional tort. Accordingly, all federal claims brought by Tommy Perkins were properly dismissed.

2. Nathalan Perkins' Federal Claims

Nathalan Perkins claims that defendants violated her Fifth Amendment right against self-incrimination, and Sixth Amendment right to counsel. Ms. Perkins alleges that in February 1997, Scott Jones approached her at McDonald's and advised her that he had a warrant to search her home. The search warrant was based on a controlled buy of an illegal drug from Ms. Perkins' home. Lieutenant Scott Jones, along with other Denham Springs police officers and Livingston Parish sheriff's deputies, executed the search warrant and found illegal drugs and drug paraphernalia. Ms.

Perkins was arrested and charged with various drug offenses. Ms. Perkins alleges defendants violated her Fourth, Fifth and Sixth Amendment rights during the search and subsequent arrest.

The Fifth Amendment to the U.S. Constitution provides that a defendant cannot be "compelled in any criminal case to be a witness against himself." Consistent with this right against self-incrimination, this Court in Miranda v. Arizona, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 1630, 16 L.Ed. 2d 694 (1966), ruled that suspects cannot be subjected to a custodial interrogation until they have been advised of their rights. Any incrimination statement elicited from a suspect in custody cannot be admitted at trial unless the suspect was first advised of his Miranda rights. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed.2d 293 (1994). There is no evidence that defendants failed to give Ms. Perkins the Miranda warnings. Ms. Perkins admitted that she signed the "rights form" showing that she read and understood the Miranda warnings. There is no allegation that the waiver was not voluntary. Furthermore, there is no evidence that Ms. Perkins made any confession or statement regarding any charges against her. Therefore, Ms. Perkins did not prove a violation of the Fifth Amendment, and this claim was properly dismissed.

The Sixth Amendment to the U.S. Constitution sets forth an individual's right to assistance of counsel in a criminal investigation. This Sixth Amendment right does not attach until adversarial criminal proceedings are initiated. Davis v. U.S., 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed. 2d 362 (1994). A person who is subjected to custodial interrogation has the right to consult with, and be assisted by, an attorney during questioning as a procedural

safeguard to that individual's right against compulsory self-incrimination. Miranda v. Arizona 384 U.S. 436, 478-479, 86 S.Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966). There being no evidence that Ms. Perkins was subjected to a custodial interrogation and invoked her right to counsel, the Sixth Amendment is not implicated, and her claim was correctly dismissed.

Additionally, Ms. Perkins seeks damages from defendants for lost wages during the period of time Mr. Oliver and Ms. Cobbs did not have a liquor license for 436A Summer Street. Ms. Perkins was a part-time cook for the business. Ms. Perkins was employed by and paid by her father, **Tommy Perkins**, to work in the restaurant and lounge. Mr. Perkins paid her $350 per month when the business was operating and "took care" of her financially while the business was not operating. Defendants have not found any authority whatsoever that would give Ms. Perkins either a claim for violation of a constitutional right, or a right or cause of action for lost wages against the Denham Springs defendants under these circumstances, assuming Ms. Perkins can prove she sustained any such damages. The Fifth Circuit properly affirmed the District Court's finding that Ms. Perkins' claims relating to the business are unsupportable.

3. The Federal Conspiracy Claims Under 42 U.S.C. §1985

To assert a claim of conspiracy under 42 U.S.C. §1985(3), a plaintiff must prove, (1) conspiracy involving two or more persons, (2) for the purpose of depriving, directly or indirectly, a person or a class of persons of the equal protection of the laws, (3) an act in

furtherance of the conspiracy which (4) causes injury to a person or property, or deprivation of any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); Hilliard v. Ferguson, 30 F.3d 649, 652-53 (5th Cir. 1994).

Because of the dismissal of the federal claims by Mr. Perkins and Ms. Perkins, these plaintiffs cannot prove any injury "in his person or property" or a deprivation of a "right or privilege of a citizen of the United States." 42 U.S.C. §1985(3). Plaintiffs freely admit that there is no evidence that a racial or other class based discriminatory animus motivated any action taken by Chief Jeff Wesley against any plaintiff.

Further, Section 1985 does not grant a cause of action for every conspiratorial tort or for every wrong committed by a common plan or design; it grants a federal cause of action only for conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Some racial or other class-based, individiously discriminatory animus is an essential element of an action under 42 U.S.C. §1985(3). Griffin v. Breckenridge, 403 U.S. at 102. Thus, "the plaintiff must show that the conspiracy was motivated by class-based animus." Hilliard v. Ferguson, 30 F.3d at 653 (citing Burns-Toole v. Byrne, 11 F.3d 1270, 1276, (5th Cir.), cert. denied, 512 U.S. 1207, 114 S.Ct. 2680, 129 L.Ed.2d 814 (1994)).

As discussed with Tommy Perkins' 14th Amendment Claims, there is no evidence of class-based animus on the part of any of the defendants against Mr. Perkins or Ms. Perkins. The plaintiffs rely on nothing more than speculation and hunch that the Denham

Springs defendants' actions were motivated by racial animus. Speculation concerning bias is categorized properly as merely a "scintilla" of evidence, which is insufficient to present a question for the jury. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). Accordingly, the conspiracy claims by Tommy Perkins and Nathalan Perkins were properly dismissed.

CONCLUSION

The Fifth Circuit correctly found that the District Court did not abuse its discretion in declining to maintain supplemental jurisdiction over any of the Louisiana state law claims. Additionally, the District Court's judgment dismissing various federal claims brought by Tommy Perkins, Eddie Oliver and Nathalan Perkins were properly affirmed by the Fifth Circuit.

Because the petitioners fail to show compelling reasons for this Court's review of the Fifth Circuit's ruling, the petitioners' writ of certiorari should be denied.

Respectfully submitted:

Bradley C. Myers (#1499)
Lana D. Crump (#23707)
KEAN, MILLER, HAWTHORNE,
D'ARMOND, McCOWAN & JARMAN, L.L.P.
Post Office Box 3513
Baton Rouge, LA 70821
Telephone: (225) 387-0999
Counsel of record for Respondents, Jeff Wesley, Scott Jones, and the City of Denham Springs

APPENDIX

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Petitioners' claims for violation of their constitutional rights and for conspiracy to violate their constitutional rights are brought pursuant to 42 U.S.C. §1983 and §1985. Section 1983 provides:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 provides, in pertinent part:

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving persons of rights or privileges

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The claims of Tommy Perkins which were dismissed on the respondents' motion for partial summary judgment were for alleged violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Louisiana Civil Code article 2315. Nathalan Perkins' claims which were dismissed on respondents' motion for partial summary judgment were for alleged

violations of the Fifth and Sixth Amendments to the United States Constitution, and La. Civ. Code art. 2315. The relevant constitutional amendments are as follows:

Amendment IV. Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; appointment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Further, petitioners invoked the district court's jurisdiction over

the state law claims pursuant to 28 U.S.C. §1367, which states:

> § 1367. Supplemental jurisdiction
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Finally, the state law claims allege violations of La. Civ. Code art. 2315, which provides in pertinent part:

Art. 2315. Liability for acts causing damages

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * *